85-1099

NO. _____

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GLEN ADKINS,

Petitioner

v.

THE C. AND O. RAILWAY CO.
AND
W. T. BRADY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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50pp

QUESTIONS PRESENTED

1. Is an intentional infliction of physical contact and emotional distress resulting in physical injury actionable under the Federal Employer's Liability Act?

2. Is a properly stated cause of action for intentional infliction of physical contact and emotional distress under the FELA barred or preempted by the Railway Labor Act when the actions of the defendant railroad are also the subject of a labor grievance?

THE PARTIES

The petitioner, Glen Adkins, is an employee of the

defendant C & O Railway Company and is a member of the Brotherhood of Railway and Steamship Clerks, Freighthandlers, Express and Station Employees, Black Diamond Lodge 1363. Respondent W. T. Brady, is a yardmaster in the employ of respondent C & O Railway Company and has been petitioner's supervisor at various times during petitioner's employment. Respondent C & O Railway Company is a corporation doing interstate business.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GLEN ADKINS,

Petitioner,

v.

THE C & O RAILWAY CO.,
AND
W. T. BRADY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Glen Adkins, the petitioner herein, prays that a writ of certiorari issue to review the judgment of The United States Court of Appeals for the Fourth

Circuit entered in the above-entitled case on the third day of October, 1985.

OPINIONS BELOW

On October 3, 1985 the Opinion and Order of the Court of Appeals (Appendix p. 1a) was rendered, affirming the Opinion and Order of the District Court.

On February 11, 1985, District Judge Robert J. Staker filed a Memorandum Opinion and Order denying petitioner's motion for remand and granting respondent's motion for summary judgment. (Appendix p. 1b) Judgment for the respondents was entered the same day. It is from

these orders that the petitioner now seeks relief.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Federal Employer's Liability Act, 45 U.S.C. §51 et. seq. and the Railway Labor Act, 45 U.S.C. §151, et. seq.

STATEMENT OF THE CASE

This action was brought by the petitioner, Glen Adkins, seeking recovery of money damages from the respondent railroad and his supervisor, W. T. Brady, for physical contact and emotional

distress resulting in subsequent physical injuries after being harassed in the performance of his duties by his supervisor.

In his deposition, the petitioner testified that his supervisor, the respondent, W. T. Brady, had engaged in a course of conduct that included the petitioner being struck in the chest several times by weighbills thrown at him, being cursed, having the petitioner's work shoved off the petitioner's desk and into the floor, being ordered to run in front of moving trains and being told consistent lies about the petitioner to his supervisors.

The petitioner eventually developed physical problems including a spastic colon from the physical contact and harassment at work.

On September 23, 1983 petitioner filed suit in the Circuit Court of Logan County, West Virginia and service was accepted by the Secretary of State on behalf of respondent Chesapeake and Ohio Railway Company (hereinafter "C & O") on September 26, 1983.

On October 26, 1983, the C & O removed the action to the U. S. District Court for the Southern District of West Virginia alleging that the petitioner's complaint

arises under and is governed by the Railway Labor Act, 45 U.S.C. §151 et seq. (hereinafter "RLA") and that therefore the District Court had jurisdiction under 28 U.S.C. §1441. The petitioner filed a motion for remand alleging that the complaint arises not under the RLA but rather under the Federal Employers Liability Act, 45 U.S.C. §51 et seq. (hereinafter "FELA") and that therefore removal was impermissible under the provisions of 28 U.S.C. §1445. Respondent filed a motion for summary judgment which was granted by the District Court.

The complaint alleges that "as a result of continued willful,

malicious and intentional harassment on the part of the defendant, W. T. Brady, an agent and employee of the defendant railroad acting within the scope of his employment that he [petitioner] was caused to suffer a spastic colon as a result of the emotional stress resultant from the aforesaid wrongs."

The complaint also alleges that respondent C & O knew or should have known of Brady's actions and failed to curtail the same. In addition, the complaint alleges that C & O "knowingly and intentionally failed to provide this plaintiff with a safe place to work" in violation of the FELA.

On October 3, 1985 the Circuit Court affirmed the order of the District Court denying the petitioner's motion for remand and granting respondent's motion for summary judgment.

REASONS FOR GRANTING THE WRIT

I.

AN INTENTIONAL INFLICTION OF PHYSICAL CONTACT AND EMOTIONAL DISTRESS RESULTING IN PHYSICAL INJURY IS ACTIONABLE UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT.

The authority that the employer's duty under the FELA is not limited to the circumstances involving just physical defects, is set forth in the following manner: 'First, it may be observed under controlling federal

law the rule which requires a railroad to furnish its employees with a reasonably safe place to work refers not only to the physical condition of the place itself but may include negligent acts of fellow employees." Rediker v. Chicago, Rock Island & Pacific Railroad, 1 Kan. App.2d 581, 571 P.2d 70, 73 (1977), cert. denied, 435 US 982 (1978).

The alleged negligence in Rediker was the inattentiveness of the engineer who allowed a sudden and unusual movement of cars in which the plaintiff was working. Similarly, the court in Denny v. Montour Railroad, 101 F. Supp. 735 (W.D. Pa. 1951), recognized that

employee negligence may trigger liability where an engineer failed to promptly stop a train on receiving the plaintiff brakeman's signal.

There is ample precedent for the proposition that a carrier's duty to provide a safe place to work may extend to prevention of intentional assaults or criminal acts by fellow employees. The controlling principles in this area have been stated as follows:

> A long line of decisions under the FELA deal with the carrier's duty to render its employee's working places safe from the intentional assaults or criminal acts of fellow employees. These decisions establish the principal that the master is liable for such conduct only when it employees acted within the scope of their

employment and in furtherance of the employer's business. Under this theory, liability of the master is vicarious in that the negligence of the offender must be imputed to the employer under the doctrine of respondeat superior. The decisions supporting this view have relied principally upon the leading decision of Davis v. Green which involved the wanton and wilful killing of an employee by a fellow worker. A judgment for the plaintiff was reversed by the Supreme Court and Mr. Justice Holmes, speaking for the court, said:

> The ground on which the Railroad Company was held was that it had negligently employed a dangerous man with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer.

> Whatever may be the law in Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey--in other words that he did a wilful act wholly outside the scope of his employment while his employment was going on.

17 Ohio St. L. J., supra, at 377-78 (citing Atlantic Coast Line Railroad v. Southwell, 275 U.S. 64 (1927); Hoyt v. Thompson, 174 F.2d 284 (7th Cir. 1949); Sheaf v. Minneapolis, St. Paul & Sault St. Marie Railroad, 162 F.2d 110 (8th Cir. 1947); Lannes v. Atchison, Topeka & Sante Fe Railroad, 344

Ill. App. 123, 99 N.E.2d 705 (1951); Young v. New York Central Railroad, 88 Ohio App. 352, 88 N.E.2d 220 (1949), cert. denied, 339 U.S. 986 (1950); Zoccano v. Long Island Railroad, 298 N.Y. 553, 81 N.E.2d 96 (1948); Osment v. Pitcairin, 349 Mo. 137, 159 S.W.2d 666 (1941), cert. denied, 320 U.S. 792 (1943); Davis v. Green, 260 U.S. 349 (1922).

In Harrison v. Missouri Pacific R. Co., 372 U.S.248 (1963), per curiam, a railroad foreman brought an FELA action as a result of being assaulted by a member of his crew. Disputed testimony was to the effect that the plaintiff's superiors were

aware of the violent nature of the assailant. After a jury verdict in favor of the plaintiff, the trial court set aside the verdict. In reversing, the Supreme Court found the testimony sufficient to support the jury's finding of reasonable foreseeability of harm, and that the lower courts had improperly invaded the function and province of the jury.

Liability was rejected in Sheaf v. Minneapolis, St. Paul & Sault St. Marie Railroad, supra, 162 F.2d 100, where the plaintiff alleged injuries as a result of an unprovoked attack by a fellow employee, known to be quarrelsome and vicious for many years. This

result was apparently based upon the reasoning that the unprovoked attack was outside the scope of employment. See also Tatham v. Wabash Railroad, 412 Ill. 568, 107 N.E.2d 735 (1952) (assault by fellow employee was outside the scope of employment so that employer was not liable on respondeat superior grounds, although the employer may be directly liable for negligence in not protecting an employee from foreseeable harm from fellow employees). The present matter is distinguishable from Tatham in that the verbal and physical harassment of the employee by his supervisor was within the normal

scope of employment.

Another analogous case is Lillie v. Thompson, 173 F.2d 481 (6th Cir. 1949), where a railroad company was held liable to a female employee for an attack by a third party. There was ample evidence that the place of work, a remote building in a dangerous area, was frequented by hoboes, thieves and other trespassers. Since the employer had knowledge or reason to know of the risk of intentional harm by third parties, it was liable for its negligence in failing to provide a safe place to work.

Under the foregoing authority, the railroad was

negligent in hiring the supervisor and not preventing or stopping his harassment of the petitioner. The railroad knew the harassing conduct and the risk to the petitioner's health, therefore liability was properly established under the FELA for failure to provide a safe place to work.

II.

A PROPERLY STATED CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF PHYSICAL CONTACT AND EMOTIONAL DISTRESS UNDER THE FELA IS NOT BARRED OR PREEMPTED BY THE RAILWAY LABOR ACT WHEN THE ACTIONS OF THE RESPONDENT RAILROAD ARE ALSO THE SUBJECT OF A LABOR GRIEVANCE

Assuming the petitioner to have a viable cause of action under the FELA certianly it was

not the intent of Congress to bar a railroad worker's rightful compensation for injuries in an effort to avoid possible conflict with the grievance procedure of the RLA.

The petitioner recognizes there to be a number of decisions finding tort claims by railroad workers to be barred by the RLA.

The Ninth Circuit in Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.), cert. denied 439 U.S. 930 (1978), found the plaintiff railroad worker to not have a cause of action for wrongful discharge and resulting emotional damages. However, the rights the plaintiff claimed to

have violated were those guaranteed to him under the labor contract and his alleged emotional damages did not arise from the performance of duties for the railroad. The Ninth Circuit addressed a similiar situation in Beers v. Southern Pacific Transportation Company, 703 F.2d 425 (1983), where the plaintiff complained of injuries suffered as a result of harassment over union representation. Had these workers in Magnuson and Beers suffered emotional damages from the performance of their duties for the railroad they presumably would have brought FELA actions and not the state tort claims they

attempted.

The district court, in the present case, relied upon an unpublished Sixth Circuit Court of Appeals ruling in Antalek v. Norfolk & Western Ry. Co., No. 82-427 (N.D. Ohio, December 28, 1983,) affirmed No. 84-3057 (6th Cir. August 30, 1984).

In Antalek, the Sixth Circuit was faced with basically the same issues as in the present case. The plaintiff Antalek alleged that his supervisors, with the knowledge of railroad management, engaged in a course of harassment, intimidation, and conspiracy to terminate Antalek's employment. After carefully reviewing the ties

that Antalek's tort action had with a pending grievance, the Sixth Circuit found Antalek's claims "inextricably interwined with the grievance machinery of the collective bargaining agreement and of the RLA" and cited Magnuson, supra, in support as well as Beers, supra, and dismissed the plaintiff's action.

The Antalek court was faced with what the petitioner herein maintains is the real crux of these type actions, i.e. if the petitioner does have a viable claim under the FELA then the RLA would not bar the claim. Therefore, the Antalek court concluded "that the tort of

emotional distress is not actionable under the FELA", and found this tort to not be contemplated by the line of cases which allow recovery under the FELA for intentional torts citing Jamison v. Encarnaction, 281 U.S. 635 (1930); Harrison v. Missouri Pacific Railroad, 372 U.S. 248 (1963), per curiam; and Brooks v. Washington Terminal Co., 593 F.2d 1285 (D.C. Cir.), cert. denied, 442 U.S. 910 (1979).

Had the Sixth Circuit found the cause of action for emotional distress to be actionable under the FELA it would appear that Antalek would have had a different outcome.

It is submitted that the Sixth Circuit reached the wrong decision in Antalek although properly recognizing the problem, i.e. that a determination of the worker's claim under the FELA must be made. Other reported decisions have generally dealt with claims such as a worker maintaining he suffered emotional distress from violation of employment rights guaranteed to him by the labor contract, Magnuson, supra; or from emotional injury from harassment over union representation and discharge, Beers, supra.

In the present case, the District Court also relied upon Buell v. Atchinson, Topeka and

Santa Fe Ry., No. S-82-776 RAR (E.D. Calif. July 12, 1984). The plaintiff, Buell, sought damages under the FELA for a mental breakdown which he alleged to be caused by his supervisor and co-employees. Plaintiff sought to hold the railway liable for its alleged failure to take appropriate disciplinary measures against his antagonists. The railway moved for summary judgment. The court ruled that the wrongdoing alleged by plaintiff related directly to the employer-employee relationship. Finding the injury had its genesis in a labor problem which constitutes a minor dispute within

the meaning of the RLA, the court granted defendant's motion for summary judgment stating:

> "Plaintiff's injury flows directly from defendant's alleged failure to take appropriate disciplinary measures with regard to alleged misconduct by plaintiff's supervisor and several of his co-workers. This type of wrongdoing in Magnuson and the failure to conduct a full and fair investigation in Beers, is directly related to the employer-employee relationship. Plaintiff has never suggested that he could not have invoked the grievance procedures contained in the collective bargaining agreement to address the harassment he was suffering. On the contrary, the fact that union representatives did submit a written grievance with regard to the perceived harassment by ... indicates that the grievance procedures did apply to this type of dispute."

It is submitted that the district court in Buell erred in

reaching its conclusion. The court failed to consider the many situations where an occurrence which gave rise to an injury, such as a derailment, results in an FELA action at the same time the railroad attempts to discipline the worker for causing the accident which leads to a grievance. Even the railroads would not argue that simply because the subject matter of such an FELA action was also subject of a grievance that the FELA action be barred.

In Cales v. Chesapeake & Ohio Ry. Co., 300 F.Supp. 155 (W.D. Va. 1969) the district court found a false imprisonment actionable

under the FELA noting that any intentional tort which inflicts bodily injury is negligence within the meaning of the FELA.

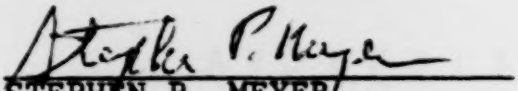
The proper matters for consideration should be from what source the injured railroad worker's emotional damages flowed. If from distress over job rights, such claims might properly be barred; however, if the distress is inflicted in the actual performance of duties for the railroad, as in the present case, the action should be allowed to be maintained.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of

certiorari be granted to review the judgment of the Circuit Court. In the event that the petition is granted, petitioner prays that the judgment of the Court below be reversed and the cause be remanded.

Respectfully submitted,



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A P P E N D I X

(UNPUBLISHED)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1204

Glen Adkins,

Appellant,

versus

The Chesapeake and Ohio Railway Company, a foreign corporation and W. T. Brady,

Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, At Huntington.
Robert J. Staker, District Judge.
(C/A 83-3488)

Argued: July 15, 1985.
Decided: October 3, 1985.

Before
RUSSELL, SPROUSE
and
WILKINSON,
Circuit Judges

Paul Perfater (Stephen P. Meyer, Meyer and Perfater on brief) for Appellant; Barbara Lee Ayres (William C. Beatty; Huddleston, Bolen, Beatty, Porter & Copen on brief) for Appellees.

PER CURIAM:

In this civil action, appellant Glen Adkins seeks to recover from appellees Chesapeake and Ohio Railway Company and W. T. Brady damages for intentional infliction of emotional distress for injuries and distress suffered by appellant while in the employ

of the railroad and while under the supervision of Mr. Brady. After a review of the record, consideration of the briefs, and following oral argument, we find that the district court properly held that appellant's claim arises under the exclusive jurisdiction of the Railway Labor Act, 45 U.S.C. §§151-188 (1983), and is one that is subject exclusively to the administrative process of the Railway Labor Act. Accordingly, we affirm on the opinion of the district court. Adkins v. Chesapeake and Ohio Railway Co., C/A No. 83-3488 (S.D.W.Va. Feb. 11, 1985).

(UNPUBLISHED)

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF
WEST VIRGINIA
AT HUNTINGTON.

GLEN ADKINS,

Plaintiff,

v. CIVIL ACTION NO. 83-3488

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY, a foreign
corporation, and W. T. BRADY,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Glen Adkins is an employee of defendant Chesapeake and Ohio Railway Company (C&O) who seeks to recover damages for mental distress and a spastic colon allegedly caused by the harassment of his supervisor at work, defendant W. T. Brady, whose

conduct the plaintiff further alleges was known or should have been known to C&O. Plaintiff brought an action in the Circuit Court of Logan County, West Virginia, against C&O and Brady pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §51. Plaintiff alleges that C&O violated the FELA by failing to provide him a safe place to work. Defendants removed the action to this court invoking jurisdiction under the Railway Labor Act (RLA), 45 U.S.C. §151.

Plaintiff has moved to remand the action to state court on grounds that removal of a FELA action is precluded by 28 U.S.C.

§1445(a) which provides: "A civil action in any state court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States." Defendants, on the other hand, contend that this action arises under the RLA and not the FELA and that plaintiff's exclusive remedy under the RLA is the grievance and arbitration process. Plaintiff has filed a grievance which remains in arbitration. Defendants move for summary judgment on these grounds. The court denies plaintiff's motion to remand and grants summary judgment

in favor of defendants.

Defendants have supplied the court and opposing counsel copies of three recent decisions all of which hold that claims like those sought to be asserted by the plaintiff herein do not arise under the FELA but are within the exclusive province of the RLA. In Antalek v. Norfolk & Western Ry. Co., No. 82-427 (N.D. Ohio December 28, 1983), affirmed, No. 84-3057 (6th Cir. Aug. 30, 1984)(unpublished order) plaintiff brought suit under the FELA alleging that harassment by railway foremen and supervisors had caused him mental anguish, emotional distress and physical

injuries requiring hospitalization. The railway moved to dismiss the complaint on grounds that plaintiff's claim was for wrongful discharge and within the exclusive jurisdiction of the RLA. The court held that the gravamen of the plaintiff's complaint, the tort of intentional infliction of emotional harm, was not actionable under the FELA and accordingly dismissed plaintiff's FELA claim.

In Scales v. National Railroad Passenger Corp., No. 84-0540 (E.D. Pa. April 23, 1984), plaintiff brought suit under the FELA in state court against the railroad and his former supervisor

alleging intentional and negligent infliction of emotional distress caused by harassment in connection with baseless disciplinary proceedings. Defendants removed the action to federal court asserting original jurisdiction under the RLA. Plaintiff moved to remand to state court. The court denied the motion to remand ruling that plaintiff's claims of harassment were within the exclusive province of the RLA.

And in Buell v. Atchison, Topeka and Santa Fe Ry. Co., No. S-82-776 RAR (E.D. Calif. July 12, 1984), plaintiff sought damages under the FELA for a mental breakdown which he alleged to be

caused by his supervisor and co-employees. Plaintiff sought to hold the railway liable for its alleged failure to take appropriate disciplinary measures against his antagonists. The railway moved for summary judgment. The court ruled that the wrongdoing alleged by plaintiff related directly to the employer-employee relationship. Because the injury had its genesis in a labor problem which constitutes a minor dispute within the meaning of the RLA, the court granted defendant's motion for summary judgment.

In light of this precedent, the court holds that plaintiff's

claims for mental distress and colitis arising from the alleged harassment by his supervisor are directly related to the employer-employee relationship and are within the exclusive province of the RLA. See also Beers v. Southern Pacific Transportation Co., 703 F.2d 425 (9th Cir. 1983); Magnuson v. Burlington Norther, Inc., 576 F.2d 1367 (9th Cir. 1978). Accordingly, plaintiff's exclusive remedy lies within the administrative process of the RLA. See Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972).

For the foregoing reasons, it

is hereby ORDERED that the motion of the plaintiff to remand this action to the Circuit Court of Logan County, West Virginia, be, and the same hereby is, DENIED and OVERRULED. It is further ORDERED that the motion of the defendants for summary judgment be, and the same hereby is, SUSTAINED.

The clerk of the court is directed to mail a certified copy of this order to all counsel of record.

CERTIFICATE

In accordance with Rule 21 of the Rules of the Supreme Court of the United States, I hereby certify that I have this 24th day of December, 1985 mailed the required copies of the Petition for Certiorari to the Clerk's Office of the Supreme Court of the United States for the purpose of filing on December 24th, 1985, and have also mailed the required copies of the above mentioned documents to all attorneys of record as follows:

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William C. Beatty
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BEATTY AND PORTER
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STEPHEN P. MEYER
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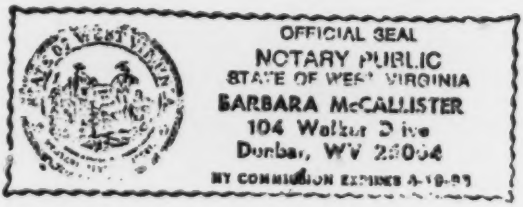
Post Office Box 2631
Charleston, WV 25329

Taken, subscribed and sworn to before me this 20th day of December, 1985.

My commission expires April 19, 1993.

Barbara McCallister
NOTARY PUBLIC



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(2)

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GLEN ADKINS,

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v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, AND W. T. BRADY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Was the Court of Appeals for the Fourth Circuit correct in holding that a railroad employee's claim for mental anguish arising out of a "minor dispute" is subject to the exclusive and mandatory jurisdiction of the Railway Labor Act, 45 U.S.C.A §151, *et seq.* (1972) even though plaintiff attempted to cast the claim as an action under the Federal Employer's Liability Act, 45 U.S.C.A. §51 *et seq.* (1972).

PARTIES

Petitioner has incorrectly stated the name of the respondent railway company. The correct name is: The Chesapeake and Ohio Railway Company.

As required by Rule 28.1 of the Rules of this Court, the following is a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Respondent corporation:

Respondent, The Chesapeake and Ohio Railway Company, is a wholly owned subsidiary of CSX Corporation. CSX Corporation has the following affiliates with publicly held equity securities:

Richmond-Washington Company
Richmond, Fredericksburg and Potomac Railroad Company
Richmond Land Company

The Chesapeake and Ohio Railway Company has the following subsidiaries or affiliates with publicly held shares:

The Baltimore and Ohio Railroad Company
Allegeheny and Western Railway Company
The Baltimore and Philadelphia Railroad Company
Clearfield and Mahoning Railway Company
The Cleveland Terminal & Valley Railroad Company
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
The Home Avenue Railroad Company
The Baltimore and Cumberland Valley Rail Road Extension Company

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

GLEN ADKINS,

Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, AND W. T. BRADY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS IN THE COURTS BELOW

Petitioner has included the unpublished February 11, 1985 Memorandum Opinion and Order of the United States District Court for the Southern District of West Virginia granting respondents' motion for summary judgment in the Appendix to the Petition at p. 16. The unpublished October 3, 1985 Opinion and Order of the United States Court of Appeals for the Fourth Circuit affirming the decision of the District Court appears in the Appendix to the Petition at p. la.

STATUTES INVOLVED

45 U.S.C.A. §151a (1972) of the Railway Labor Act ("RLA") provides:

> The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C.A. §153 First (1972) of the Railway Labor Act ("RLA") provides in pertinent part:

> *First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review.* There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after approval of this Act [enacted June 21, 1934], and it is hereby provided —
>
> * * * *
>
> (i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act [enacted June 21, 1934], shall be handled in the usual manner up to and

including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Section 1 of the Federal Employers' Liability Act ("FELA"), 45 U.S.C.A. §51 (1972) provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

STATEMENT OF THE CASE

Judge Robert J. Staker of the United States District Court for the Southern District of West Virginia granted summary judgment in favor of the defendants herein. The judgment was affirmed by the Fourth Circuit Court of Appeals on the ground that the District Court had properly held that plaintiff's claim for mental distress and colitis from alleged work place harassment by his supervisor is not actionable under the Federal Employers' Liability Act (hereinafter "FELA"), 45 U.S.C.A. §51 *et seq.* (1972), because the claim arose under the exclusive jurisdiction of the Railway Labor Act (hereinafter "RLA"), 45 U.S.C.A. §151-188 (1972) and is one that is subject exclusively to the administrative process of that Act. See Opinion and Order of Fourth Circuit, App. to Pet. 1a. Petitioner now seeks review in this Court from the decision of the Fourth Circuit.

It is the position of respondent Railway Company that this case, as the lower courts have held, is nothing more than a minor dispute, or grievance, under the exclusive jurisdiction of the Railway Labor Act. The legal concepts, precedents and guidelines which governed its disposition below are well established and were properly applied to the facts of the case; so much so that the Fourth Circuit, not seeing the need to further crowd the literature with a redundant opinion, issued only an unpublished opinion affirming on the basis of the opinion of the District Court. There is in this instance no conflict with other federal laws or policies, and, therefore certiorari should be denied.

Although the facts of this case, as will be seen later in this Statement of the Case, readily demonstrate that there is no real question needing resolution by the Court in this case, it must be pointed out that the plaintiff's attempt herein to disguise an obvious minor dispute as an action under FELA highlights an important issue which, while actually non-existent in this case, is squarely before the Court in *Buell v. Atchison, Topeka & Santa Fe Ry. Co.*, 771 F.2d

320 (9th Cir. 1985), that is, the relative scope of FELA and RLA. The conflict over this issue involves at least four circuits and arguably several others. *Compare Buell v. The Atchison, Topeka & Santa Fe Ry. Co.*, 771 F.2d 1320 (9th Cir. 1985), *with Lancaster v. Norfolk and Western Ry. Co.*, 773 F.2d 807, 813-15 (7th Cir. 1985), *Adkins v. Chesapeake and Ohio Ry. Co.*, No. 85-1204 (4th Cir. Oct. 3, 1985), and *Antalek v. Norfolk and Western Ry. Co.*, No. 84-3057 (6th Cir. Aug. 30, 1984)[1]. This conflict is significant because it involves the interplay between two federal statutes governing the railroad industry[2].

However, for at least three reasons, the *Buell* case is a far more appropriate vehicle than this case for the resolution of the dilemma the Ninth Circuit has created byholding, contrary to the views of other courts which have considered the issue, that a claim for emotional injuries resulting from stress in the work place is actionable under FELA. First, in this case, unlike *Buell,* there is no published opinion setting forth the details of the Court of Appeals' reasoning; rather, there is simply an unpublished order adopting the opinion of the District Court for the Southern District of West Virginia. Thus, the erroneous decision of the Court of Appeals in *Buell,* in contrast with the decision in this case, is already affecting litigation beyond the circuit in which it was decided. Second, it was the decision in *Buell,* not the decision in this case, which created the conflict at issue by holding contrary to the strong line of precedent from this Court emphasizing the exclusivity of the remedy afforded by the Railway Labor Act. Indeed, as we have previously pointed out, the Fourth Circuit apparently

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[1] See also *Landfried v. Terminal R. Ass'n of St. Louis,* 721 F.2d 254 (8th Cir. 1983); *Yawn v. Southern Ry. Co.,* 591 F.2d 312 (5th Cir. 1979).

[2] The gravity of the conflict at issue as it affects the railroad industry is accurately described in the Brief for the Association of American Railroads and National Association of Railroad Trial Counsel as Amici Curiae in Support of Petition on *Buell,* No. 85-1140. So as not to burden the Court with repetitive pleadings, Respondent hereby adopts and incorporates the position set forth in the AAR/NARTC brief as its own.

believed the issue to be so well-settled that it did not even publish its opinion. Finally, there is no need for the Court to review the decisions in both this case and *Buell.* Clearly in this case a minor dispute is involved and the decision reached is correct. On the other hand, in *Buell,* the decision was incorrect because the facts there also involved a classic minor dispute, and the erroneous decision should be rectified to assure continued stability in railway labor relations.

In sum, the petition for a writ of certiorari in this case should be denied. Respondent respectfully submits, however, that the petition for a writ of certiorari to review the decision of the Ninth Circuit in *Buell* should be granted.

It takes only a cursory review of the *Adkins* facts to make it readily apparent that granting certiorari in *Adkins* is not necessary because this is, in railroad labor parlance, a "minor dispute" subject to the mandatory provisions of the grievance process of the Railway Labor Act. The Act itself defines "minor disputes" as:

> . . . disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions. . . . 45 U.S.C.A. §153 First (i) (1972).

Although somewhat disguised by the pleading of the complaint, which alleges that "as a result of continued willful, malicious and intentional harassment" by his supervisor in his job for the Railway Company, plaintiff suffered "a spastic colon as a result of the emotional stress," the facts gleaned from plaintiff's own admissions in deposition show nothing more than ordinary work place frustrations coupled with the robust language and clash of strong personalities that are commonplace in the day-to-day labor context of the railway industry.

This action grew out of events which commenced in 1980 when plaintiff began to work on a job in which Mr. Brady was yardmaster. At that time, plaintiff had been an

employee of the railway company, for several years and was, and still is, a member of The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Plaintiff is obviously rather high strung. Long prior to assuming the job under Brady, he had a bout with ulcers in 1974, (App. Below 101) and in 1978 received a series of shock treatments for a nervous condition (App. Below 97). On another occasion he was hospitalized for a "nervous condition" (App. Below 98). He is apparently a person who believes in asserting himself, for he had filed some ten or fifteen grievances (App. Below 46) prior to bidding for the day shift job in 1980 where he came into conflict with his supervisor, Brady.

Adkins testified that Brady was responsible for him being disqualified from the day shift position. As a result of that disqualification, a grievance was filed on behalf of the plaintiff by the Local Chairman of Lodge 1363 on July 7, 1980. Shortly thereafter, a second grievance letter, dated July 17, 1980, was also filed on behalf of the plaintiff by the Local Chairman. That grievance charged Brady with harassing the plaintiff, with assigning work to him that the union felt was properly that of another clerk, with pressuring the plaintiff to work more quickly, with scheduling his work improperly, with giving plaintiff too many orders at once, and with complaining about plaintiff's performance to other officials. This grievance, according to plaintiff, is still pending and he intends to pursue it. Plaintiff also filed a third grievance, dated July 30, 1980, which asserted a claim for wages allegedly lost as a result of the disqualification.

At plaintiff's request, a test was given on July 31, 1980, and it was concluded that he showed sufficient ability during the test to warrant additional time to try to qualify. Therefore, the Railway and the union agreed that he would have thirty additional days to attempt to qualify as a yard clerk. He remained in that position but experienced dif-

ficulties performing in a satisfactory manner. A Board of Inquiry was held on September 30, 1980, in which Adkins was charged with a failure to perform assigned duties. The investigative board recommended a five day suspension, but upper level management imposed no discipline, (App. Below 58 *et seq.*)

Despite somewhat misleading implications in the petition, plaintiff was never physically attacked. He does say Brady "hit me in the chest several times with weigh bills, just throwed them at me" (App. Below 23). Of course, weigh bills are just sheets of paper incapable of causing physical harm, and there is no evidence that Adkins sustained any injury whatsoever as a result of this inconsequential contact. As a matter of fact, his alleged spastic colon did not develop until many months later in September of 1981 (App. Below 69) and was, according to his physician, as the plaintiff explained, "caused by something that's aggravating your mind" (App. Below 73). Thus contrary to Petitioner's unsupported insinuation, [See Questions Presented, Pet. (i)] the contact did not bring about any injury.

Patently, these facts divulge a classic dispute between an employer and employee over how work is to be done — the terms and conditions of employment. Whatever emotional anguish is involved comes not from an unsafe place to work, but from Adkins' belief that he has been wronged and from concern over his grievances. His problem with his spastic colon, as he himself explained, was not a physical injury or in any way caused by an unsafe place to work. It was, instead, according to his own characterization, brought on by his worry "that each day that I went to work I was feared of being fired on account of my boss outright lying on me to higher officials" (App. Below 73). While he may have been somewhat more sensitive than other employees, his anxiety, nevertheless, was that which routinely is experienced by those involved in day-to-day work place grievances in the railway labor world. Under the facts, this is simply a

minor dispute within the exclusive province of the grievance mechanisms of the Railway Labor Act and is not concerned with, nor in conflict with, the Federal Employers' Liability Act.

The District Court and the Court of Appeals for the Fourth Circuit were thus clearly correct in sustaining summary judgment for the defendants and therefore, their decisions do not need to be reviewed by this Court.

SUMMARY OF ARGUMENT

This court has repeatedly held that work place labor grievances, or "minor disputes" as they are characterized in railroad parlance, are to be decided only by the National Railroad Adjustment Board. A minor dispute has been defined as an individualistic work place grievance pertaining to differences arising incidental to the employment relationship. Here the plaintiff disagreed with management's directives and the manner in which he was requested to do his job, and he filed a grievance disputing the decision and questioning managerial decisions. These circumstances present a classical industrial labor grievance and a typical minor dispute under the Railway Labor Act.

The fact that petitioner has characterized his claim as a tort under the Federal Employers' Liability Act does not save it from the Railway Labor Act's mandatory provisions. Petitioner's claim of emotional distress plainly comes from his worry over his dispute and not from physical trauma. His distress is nothing more than that which is typically a concomitant of a labor grievance. To allow him to make an "end run" around the Railway Labor Act under the circumstances would totally emasculate the dispute resolution procedures mandated by Congress and by national labor policy. Clearly, in sustaining summary judgment based upon the exclusiveness of the Railway Labor Act, both the District Court and the Fourth Circuit reached a correct decision based on well-settled law, and therefore this case holds no

question requiring resolution by this Court. Accordingly certiorari should be denied.

ARGUMENT

I. THE DECISIONS OF THIS COURT EMPHATICALLY HOLD THAT MINOR DISPUTES UNDER THE RAILWAY LABOR ACT ARE SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD.

Over and over again, this Court has insisted that railway labor work place grievance disputes, or minor disputes as they are called in railroad parlance, such as the one described in this case are subject to the exclusive and compulsory, rather than optional, arbitration jurisdiction of the National Railroad Adjustment Board. *Andrews v. Louisville & Nashville R. R. Co.*, 406 U.S. 320, 326 (1972); *Gunther v. San Diego & A. E. R. Co.*, 382 U.S. 257, 263-64 (1965); *Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U.S. 33, 38 (1963); *Trainmen v. Chicago R. & I. R. Co.*, 353 U.S. 30 (1957). In addition to recognizing that the language of the Railway Labor Act [See 45 U.S.C.A. §§151a and 153 First (1972)] and its legislative history support the exclusiveness and finality of its jurisdiction, the Court has been impressed with reasons of policy which favor mandatory arbitration by the Board. In *Slocum v. Delaware L. & W.R. Co.*, 339 U.S. 239, 243-244 (1950), the Court found that the need for the expertise of the Board in railroad contract matters and labor disputes and the desirability of uniformity in interpretation throughout the industry require deference to Board jurisdiction and that:

> This reasoning equally supports a denial of power in any court - state as well as federal - to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act.

A more detailed account of the development of these concepts of exclusivity is well stated in part I of the Brief for

the Association of Railway Trial Counsel as Amicus Curiae in Support of Petition in *Buell,* No. 85-1140 and is adopted here to avoid needless repetition.

II. THE DISPUTE RAISED BY THE PLAINTIFF HEREIN WAS A MINOR DISPUTE SUBJECT TO THE EXCLUSIVE AND COMPULSORY JURISDICTION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD AND THE COURT BELOW WAS CORRECT IN GRANTING SUMMARY JUDGMENT.

Minor disputes as defined by the RLA, 45 U.S.C.A. §153 First (i) (1972), are grievances dealing with individual work place rights concerning labor contracts, rate of pay, rules or working conditions and other incidents of the employment relationship. The term "minor dispute" was defined in *Elgin, J. E. R. Co. v. Burley,* 325 U.S. 711, 723 (1945) where it was explained that a minor dispute

> contemplates the existence of a collective bargaining agreement already concluded or at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an *omitted case.* In the latter event, the claim is founded upon *some incident of the employment relation,* or asserted one, independent of those covered by the collective agreement . . . In either case, the claim is to rights accrued not merely to have new ones created for the future. (Emphasis added).

Thus, by definition, a "minor dispute" exists whenever a grievance pertains to differences arising incidental to the employment relationship, and it is not necessary that the particular grievance be explicitly addressed in any provision of the existing collective bargaining agreement. *Elgin, J. & E. R. Co. v. Burley, supra.* See also *Airline Flight Atten-*

dants in Service of Texas International Airlines, Inc. v. Texas International Airlines, Inc., 411 F. Supp. 954 (S.D. Tex. 1976), *aff'd*, 559 F.2d 104 (5th Cir. 1978). Minor disputes concern grievances which

> affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidently in the course of an employment. They represent specific maladjustments of a detailed or individual quality.

Elgin, J. & E. R. Co. v. Burley, supra at 724.

Here Mr. Adkins' grievance was purely individualistic in nature and came about incidentally in the course of his railroad employment. It fits precisely the definition of a "minor dispute" under the Railway Labor Act. See *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723, 724 (1945). Adkins did not like taking management's directives and disagreed with management about the manner in which he was asked to perform his job. Management questioned his ability to do the job, and he filed a grievance questioning the Railway's judgment as well as his immediate supervisor's management decisions. His is the classic industrial grievance and a typical minor dispute which must be disposed of in accordance with Railway Labor Act procedures. The Courts below readily recognized this, applied well established law and reached a correct conclusion on the facts before them.

The fact that the petitioner characterizes his claim as arising under the provisions of the FELA permitting recovery for injuries due to negligence by a railroad employer "does not save it from the Act's [RLA] mandatory provisions for the processing of grievances" *Andrews, supra* 324. Plaintiffs are not permitted to make "an end run around the jurisdictional scope of RLA by the use of an ingeniously framed complaint alleging a tort." *De La Rosa Sanchez v. Eastern Airlines, Inc.*, 574 F.2d 29, 32 (1st Cir. 1978). Nor can they recast minor dispute claims as tort claims.

Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 (9th Cir.) *cert. denied* 439 U.S. 930 (1978). Also see *Beers v. Southern Pacific Transportation Co.*, 703 F2d. 425 (9th Cir. 1983); *Salcedo v. Norfolk & Western Railway Co.*, 572 F. Supp. at 286 (E.D. Mich. 1982); and *Majors v. U.S. Air, Inc.*, 525 F. Supp. 853 (D. Md. 1981).

There is good reason for this protective attitude, for to allow a minor dispute to be disguised as a tort claim for so-called emotional injury would effectively destroy the very fabric of the Railway Labor Act's scheme for the resolution of minor disputes in the railway labor industry. As pointed out in *Magnuson, supra* at 1369.

> . . . Every employee who believes he had a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged. Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge. If the pleading of emotional injury permitted aggrieved employees to avoid the impact of the R.L.A., the congressional purpose of providing a comprehensive Federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted.

This Court, itself, has expressed similar fears concerning the undermining of the favored contractual grievance and arbitration processes arrived at through collective bargaining under the National Labor Relations Act. Justice Powell speaking in *Farmer v. United Brotherhood of Carpenters,* 430 U.S. 290, 305 (1977) pointed out that

> . . . The potential for undue interference with Federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts. . . .

To allow every disgruntled employee to phrase an action

as either common law tort or as a statutory negligence action under FELA based upon the emotional upheaval brought on by a disagreement with management in a grievance dispute would totally vitiate the federal policy which holds that grievance machinery remedies of the Railway Labor Act, as well as the Labor Management Relations Act are exclusive. In the language of *Republic Steel v. Maddox,* 379 U.S. 650, 653 (1965) a rule creating such a situation

> would inevitably exert a disruptive influence upon both the negotiation and the administration of collective agreements.

In fact, the successful grievance resolution procedure so heavily relied upon by labor and management to maintain day to day industrial peace in the railway industry would utterly be destroyed only to be replaced by *ad hoc* chaos if the exclusivity of the grievance remedy is undermined.

CONCLUSION

From the discussion, it is patent that this case involves a minor dispute under the Railway Labor Act. Petitioner's claim of emotional distress plainly comes from worry over his dispute and not from any physical trauma. That petitioner characterizes his claim as a tort under the FELA does not save it from the RLA's mandatory provisions. Thus, both the District Court and the Fourth Circuit reached a correct decision based on well settled law in granting summary judgment, and there is no question for resolution by this Court.

However, the erroneous decision of the Ninth Circuit in *The Atchison Topeka and Santa Fe Railway Company v. Buell,* No. 85-1140, has created a conflict among the circuits and, for reasons deliniated in the *Statement of Case* in this brief, should be reviewed by this Court and corrected to assure continued stability in railway labor matters.

Respectfully submitted,

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